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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, DC 20554

SEP - 8 2003

In the Matter of	)	FEDERAL COMMUNICATIONS COMMISSION
	)	OFFICE OF THE SECRETARY
Amendment of Parts 1, 21, 73, 74 and 101 of the	)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of Fixed	)	RM-10586
and Mobile Broadband Access, Educational and Other	)	
Advanced Services in the 2150-2162 and 2500-2690	)	
MHz Bands	)	
Part 1 of the Commission's Rules - Further Competitive	)	WT Docket No. 03-67
Bidding Procedures	)	
Amendment of Parts 21 and 74 to Enable Multipoint	)	MM Docket No. 97-217
Distribution Service and the Instructional Television	)	
Fixed Service Amendment of Parts 21 and 74 to Engage	)	
in Fixed Two-Way Transmissions	)	
Amendment of Parts 21 and 74 of the Commission's Rules	)	WT Docket No. 02-68
With Regard to Licensing in the Multipoint Distribution	)	RM-9718
Service and in the Instructional Television Fixed Service	)	
for the Gulf of Mexico	)	

**COMMENTS OF**  
**HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK INC.**

Hispanic Information and Telecommunications Network, Inc. ("HITN"), by its attorneys, hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above captioned matter.<sup>1</sup>

**I. INTRODUCTION**

HITN is a non-profit private foundation whose mission is to promote educational opportunities for Hispanic Americans through multiple media outlets and

<sup>1</sup> Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 03-56 (rel. April 2, 2003) 18 FCC Rcd 6722 (2003).

telecommunications services. HITN is one of the largest license holders of Instructional Television Fixed Service ("ITFS") spectrum and holds licenses in more than forty markets throughout the United States that are used to provide educational programming and advanced broadband wireless services.<sup>2</sup> HITN purchases channel capacity from EchoStar to broadcast its 24-hour public interest Spanish language channel, HITN-TV, over the Dish Network, and its programming is carried on the Time Warner Cable Network. HITN also provides satellite based broadband Internet access to some of the poorest schools and libraries throughout the most remote regions of Puerto Rico.

By its NPRM, the Commission has solicited comment on a white paper proposal submitted on October 7, 2002, by the Wireless Communications Association International, Inc. ("WCA"), Catholic Television Network ("CTN"), and the National ITFS Association ("NIA")<sup>3</sup> ("Coalition Proposal"), as well as some alternative options raised by Commission Staff in the NPRM. Comments expressing the general opinions of the ITFS/MDS community are being filed concurrently today by NIA in conjunction with the WCA and CTN, which jointly address a broad range of the issues raised in the NPRM ("Coalition Comments").<sup>4</sup> HITN is submitting these comments to generally support the conclusions advanced in the Coalition Proposal and Coalition Comments and to address certain specific issues for which HITN possesses a unique point of view.

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<sup>2</sup> Through a partnership with Clearwire Holdings, Inc., which is leasing the excess capacity of our ITFS channels in Jacksonville, Florida and several other markets, HITN and Clearwire launched next generation broadband wireless service in Jacksonville in January 2003. For more information see: <http://www.clearwire.com/default.asp?IsDev=False&NodeId=686>

<sup>3</sup> NIA is a non-profit organization composed of educational and non-profit ITFS licensees, permittees and applicants. NIA acts as an industry association gathering and disseminating information on issues related to ITFS, and represents the interests of its members.

<sup>4</sup> Comments of WCA, NIA and CTN, WT-Docket No. 03-66, filed September 8, 2003.

## **II. EXTENSION/SUPSPENSION OF CONSTRUCTION REQUIREMENTS**

In the NPRM, the Commission requests comment regarding applications for extension of construction permit filed by ITFS and MDS licensees.<sup>5</sup> HITN proffers this is one of the most important issues facing ITFS license holders in this proceeding as the Commission's ultimate decision regarding this issue will have very serious consequences to the educational spectrum and current ITFS licensees.

### **A. Commission History of Condoning ITFS/Commercial Partnerships and the Effect on ITFS Station Construction**

In 1983, the Commission adopted a Report and Order in General Docket No. 80-112 which condoned, and over time caused the individual review and approval by the Commission of, contractual excess capacity leasing arrangements between educational licensees in the ITFS service and commercial wireless cable Operators.<sup>6</sup> The basic concept was to allow ITFS licensees to develop an additional source of revenue for the construction and programming of their instructional facilities, while simultaneously allowing Operators to lease excess airtime capacity on those facilities in order to create wireless cable systems with sufficient channel capacity to compete with incumbent wireline cable systems. Unfortunately an unanticipated and perverse result of such agreements has been that some stations have remained unconstructed for many years. ITFS licensees have in many cases found themselves bound by such contracts and at the mercy of the ever changing economic fortunes and business plans of their commercial

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<sup>5</sup> See NPRM at para. 201-202.

<sup>6</sup> See In re Amendment of Parts 2, 24, 74 & 94 of the Commission's Rules Regarding Frequency Allocation to ITFS and MDS, 94 FCC2d 1203, FCC 83-243, released July 15, 1983.

partners, the processing backlog of the FCC, regulatory uncertainty, and the difficulties and limitations created by disparate FCC rules and policies under which their commercial partners have attempted to assemble systems comprised of stations in two different services.

Over the past two decades, ITFS licensees have had to navigate constant changes in the marketplace and regulatory structure governing their stations that resulted from the Commission's decision to allow commercial entities to lease ITFS excess capacity. Initially, ITFS licensees dealt with Operators' requests that their facilities be relocated to collocate with other educational and commercial stations in their markets in order to create a system with a consistent coverage area and service quality. To accommodate this, ITFS licensees had to await the grant of multiple station applications, allowing for the simultaneous construction and launch of the Operator's entire system. Such relocations were often delayed by the need for numerous consent letters from potentially affected neighboring licensees, limited filing windows (occurring only in 1995 and 1996), and application processing backlogs. The inability of Operators to quickly bring their commercial services to market resulted in the loss of capital investment and the ultimate failure of many of them. Ultimately, many unconstructed systems, their component ITFS leases, and related construction obligations were assigned to successor commercial operators who viewed the only potential for a competitive commercial service to require additional channel capacity, which could only be achieved through digital compression. Accordingly, ITFS licensees with unconstructed facilities were forced to await digital rules and amendments to their pending applications. Again, delays in drafting rules, filing modifications, and processing such applications resulted in the

eventual failure of many Operators and the abandonment of their commercial service model. ITFS licensees found themselves the victims of the economic misfortunes of their commercial partners, and ultimately found their leases assigned to new successor Operators who pinned their commercial hopes on new two-way operations. ITFS licensees again found the construction of their facilities delayed by the need for new two-way rules, the opening of a filing window, as well as the preparation, filing and processing of such applications. With the most recent downturn in the economy, the unexpected failure of well-healed commercial partners like WorldCom, Inc., the need for the development of more advanced two-way equipment, and the prospect of mobile applications in this band and more regulatory changes to come in this proceeding, ITFS licensees are once again being told that construction of their facilities will be delayed.

It has been extremely difficult for ITFS licensees whose stations have remained unconstructed to terminate lease agreements due to Operator defaults under those leases. In some cases where ITFS licensees have terminated leases, licensees have been confronted with breach of contract suits, Operators that refuse to permit collocation of facilities on their towers, oppositions to modifications filed independent of a lessor/Operator, as well as the prospect of sizeable construction and operating costs. It would be unfortunate if ITFS licensees and these valuable instructional facilities became the victims of regulatory uncertainty as well as the failed commercial aspirations of the Operators leasing their spectrum as condoned by the Commission.

Because the Commission's ITFS rules have historically encouraged leasing relationships between educators and Operators and have led to a policy in favor of giving Operators control over development of wireless cable systems using ITFS frequencies,

HITN, like most other ITFS licensees, has entered into airtime lease agreements under which the Operator assumed full responsibility for construction of the station and under the leases (which have been approved by the Commission), the licensee retained little control over the construction of its facilities. Because of a reliance on Operators, some of these stations remain unconstructed today. Operators have been faced with a "Hobson's choice": either construct stations at significant expense using obsolete legacy technology for inefficient uses in an uncertain regulatory environment, or face defaulting on construction obligations under ITFS leases and force ITFS lessors into the perilous position of potentially losing authorizations.<sup>7</sup>

#### **B. Blanket Construction Permit Request Grant**

Because of the past decade of regulatory uncertainty and problems between ITFS licensees and legacy Operators, which for the reasons discussed herein have been unable to construct certain ITFS stations over the past several years as required by the leases, as part of the current regulatory overhaul to facilitate full flexible usage of the ITFS spectrum, HITN believes the public interest requires that the Commission provide ITFS licensees a fresh opportunity to develop their facilities that have remained unconstructed.

HITN requests the Commission provide a blanket grant of all timely filed construction permit requests made for unconstructed stations that have been filed since the release of the Commission's Notice of Proposed Rulemaking in the Matter of Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, 12 FCC Rcd 22174 (1997), released October 10, 1997 ("NPRM Release

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<sup>7</sup> It could be argued that whichever route an Operator chose to follow would constitute a default under an airtime lease. Constructing a non-viable wireless cable system using legacy technology could potentially be a default under an airtime lease just as the failure to construct.

Date") ("NPRM"), and that remain pending today. All such construction permit extension requests made since the NPRM Release Date should be granted because this date substantially marked the beginning point of the trying regulatory and marketplace uncertainty that has plagued ITFS licensees over the past several years, which has been the cause of the construction failures for most. HITN submits that the Commission should further include a blanket grant of all such timely filed construction permit extension requests made since the NPRM Release Date that were denied by staff for any reasons and that are the subject of timely filed petitions for reconsideration and applications for review that remain pending today. The Commission should include these actions in the blanket grant because of the uncertainty faced by Commission staff who were making decisions on applications over this time period regarding what constituted activity beyond a licensee's control that made it impossible for a licensee to construct. In granting this blanket grant of construction permit extension requests, the Commission should apply a presumption in favor of ITFS licensees whose stations remained unconstructed since the NPRM Release Date that they have been unable to construct due to reasons beyond their control. In authorizing such a blanket grant, the Commission would be erasing an era of uncertainty and providing educational licensees an opportunity to develop their ITFS authorizations for educational usage and advanced new broadband wireless applications under clear new rules the Commission envisions.

To ensure licensees receive a reasonable time to migrate to a new era of rules, the Commission should also provide ITFS licensees a blanket waiver regarding further construction obligations until such time that new rules become effective, including new construction obligations and obligations to construct stations that have/will be

deconstructed by operators during this transition.<sup>8</sup> This will save the Commission valuable time and resources that otherwise would be spent processing extension requests and assure licensees their stations will not risk being forfeited during this transitional period.

### **III. THE COMMISSION SHOULD ADOPT THE BANDPLAN CONTAINED IN THE COALITION PROPOSAL**

HITN supports adoption of the Coalition Proposal because it will maintain essential traditional high power high site ITFS operations, while providing an efficient spectrum usage plan that will minimize the number of guardbands needed and allow for the largest number of possible network designs.<sup>9</sup> The physical separation of high power downstream operations from new low power cellularized operations as well as the deinterleaving of frequency assignments, will leave ITFS licensees with 6MHz in the MBS for continued high power use while providing them with 16.5 MHz of contiguous spectrum suitable for the development of innovative cellularized low power educational and commercial services.<sup>10</sup> The needs of individual licensees for different configurations of spectrum in the LBS, MBS or UBS have been accommodated through placing the burden on the proponent to maintain existing ITFS operations in achieving

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<sup>8</sup> HITN supports adoption of a substantial service construction requirement upon renewal, as is being requested in the Coalition Proposal.

<sup>9</sup> The Coalition Proposal efficiently allows for the development of multiple networks using either Time Division Duplexing ("TDD") or Frequency Division Duplexing ("FDD") with the least possible waste of spectrum for guardband protection by allowing the essential high power high site operations of the MBS to operate as the needed separation for FDD systems. Other bandplans proposed in the NPRM, such as the alternating plan for low and high power segments would require additional guardband segments while adding little increased utility of the spectrum.

<sup>10</sup> Deinterleaving of the spectrum will increase the usefulness of an individual licensee's capacity and will diminish the complexity of introducing new services by lessening the need for consent letters from co-channel and adjacent-channel licensees.



the bandplan transition through digital compression and by allowing for channel swaps and purchases.<sup>11</sup>

With the Hispanic community now constituting 14% of the overall population it has become the largest ethnic and minority language population in the United States. Accordingly, HITN foresees an ongoing need for its traditional high power video operations for the dissemination of Hispanic educational and cultural programming to its receiving institutions and believes that the coalition has struck a fair balance to accommodate such services.<sup>12</sup> Where the need for such services change with time, the Coalition Proposal is flexible enough to allow for high power data operations, or even low power operations on such channels in some cases. This high power high site video solution remains the most cost effective means for HITN to reach its receiving institutions and Hispanic population centers. Replacement of such high site, high power operations with low power, low site downstream facilities as is suggested in the NPRM, would be cost prohibitive as it would entail the building of a host of new transmit sites along with all related tower lease, construction, back-haul interconnection and operating costs.

#### IV. OTHER ISSUES

HITN supports the Coalition Proposal that the Commission award each ITFS

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<sup>11</sup> HITN believes that the Coalition Proposal to allow the proponent and market forces to determine the timing and order of market conversions to the new bandplan, while requiring such proponent to assume the costs for the transition of ITFS Licensees, strikes a fair balance between financial realities, business planning, and consumer needs while ensuring that ITFS licensees, those least equipped to assume the cost of the transition are assisted by the proponent in this regard.

<sup>12</sup> HITN believes, given current compression technology, as well as secondary market options that would allow ITFS entities with greater demand for MBS spectrum to swap or exchange with other ITFS entities in the market with lesser needs, the size of the MBS set forth in the Coalition Proposal should be sufficient to provide for the continuation of essential high power ITFS operations, while freeing up substantial spectrum to allow for new low power instructional and commercial services.

licensee with a discrete Geographic Service Area based on its current 35 mile protected service area, splitting any PSA overlaps that exist with adjacent-market co-channel licensees. HITN also supports the continuation of site-by site licensing of high power operations in the MBS band segment.

HITN further supports the Coalition Proposal regarding auctioning of ITFS white space and ITFS channels subject to currently mutually exclusive applications. Any available ITFS white space in any market should be auctioned only to eligible ITFS entities. However, only entities whose applications are currently mutually exclusive and that have been accepted for filing by the Commission should be permitted to participate in an auction against each other for the channels that are subject to those applications. The Commission should not require any minimum bid in any of these auctions and should not allow any third party commercial entities to directly fund the bids of any participant.

Last, HITN strongly supports the Joint Comments of NIA and CTN, being filed concurrently with the Coalition Comments in this proceeding, which request that the Commission not permit any ITFS licensee to sell its ITFS authorization to a commercial entity.<sup>13</sup> As the Joint Comments properly suggest, permitting the sale of ITFS spectrum to non-eligible ITFS entities would undermine this valuable educational spectrum and its importance to the educational community in the United States. Only eligible ITFS entities should be able to hold authorizations to this spectrum to ensure it will continue to be used for the purposes for which it was originally licensed.

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<sup>13</sup> Joint Comments of the Catholic Television Network and the National ITFS Association, WT Docket No. 03-66, filed September 8, 2003 ("Joint Comments").

## VII. CONCLUSION

For the forgoing reasons, the Commission should adopt the Coalition Proposal and the proposals made by HITN herein.

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